

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	4:03CR3056-1
	)	
Plaintiff,	)	
	)	<b>MEMORANDUM</b>
vs.	)	<b>AND ORDER</b>
	)	
ANGEL ABARCA SANDOVAL,	)	
	)	
Defendant.	)	

The clerk of the court, treating filing 124 as a notice of appeal,<sup>1</sup> has inquired whether Defendant may appeal in forma pauperis. Although the appeal is untimely, and although a certificate of appealability will not issue, the appeal appears to be taken in good faith, such that the defendant may continue to proceed in forma pauperis pursuant to Fed. R. App. P. 24(a)(3).

Before the defendant's appeal can proceed, however, a certificate of appealability must issue. See Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has rejected a constitutional claim on the merits in the course of denying a § 2255 motion, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" in order to meet the standard contained in § 2253(c). Slack v. McDaniel, 529 U.S. 473, 484 (2000). In contrast, when a district court denies a § 2255 motion on procedural grounds without

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<sup>1</sup> I previously treated filing 124 as a motion for the issuance of a certificate of appealability, and denied the same. See memorandum and order entered on April 17, 2007 (filing 125).

reaching the applicant's underlying constitutional claims on the merits, a certificate of appealability should issue under § 2253(c) when "the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* For the various reasons set forth in the court's memorandum and order entered on July 31, 2006 (filing 122), the court concludes that the defendant has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c).

IT IS ORDERED:

1. That a certificate of appealability shall not issue in this case;
2. That, in response to the clerk's inquiry (filing 127), the defendant may proceed in forma pauperis on appeal; and
3. The clerk of the court shall transmit a copy of this memorandum and order to the United States Court of Appeals for the Eighth Circuit.

April 26, 2007.

BY THE COURT:

*s/ Richard G. Kopf*  
United States District Judge